APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-70-C-13

BERT A. LYNCH, JR., *Plaintiff*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, DORA A. LYNCH, MARTHA ANN LYNCH PORTER and DORA A. LYNCH, Trustees of the Marital Trust and Residuary Trust established under the Last Will and Testament and First Codicil thereto of B. A. Lynch, deceased, *Defendants*

Memorandum Opinion

This memorandum will be filed by the Court with the clerk as the basis for its decision upon defendants' "Motion to Dismiss for Want of Jurisdiction of Subject-Matter and on Ground of Mootness," filed herein on October 2, 1970. To understand the issues, however, it will be best to analyze the case as it stood *prior* to the events referred to in the October 2 motion.

The complaint, filed herein on April 13, 1970, purports to set forth two causes of action in separate counts.

As originally filed, count I named the plaintiff's mother, Mrs. Dora A. Lynch, and plaintiff's sister and brother-in-law, Martha Ann Lynch Porter and Robert A. Porter, as defendants. The plaintiff is alleged to be a citizen and resident of Missouri and the three named defendants are alleged to be citizens and residents of Blytheville, Arkansas. Mrs. Porter and Mrs. Dora Lynch are named individually and as trustees of two trusts established under the will,

and codicil thereto, of B. A. Lynch, deceased. The complaint and the exhibits attached thereto indicate that Mr. B. A. Lynch died on December 13, 1963, leaving surviving him his widow, the defendant Mrs. Dora A. Lynch, and three children: the plaintiff, the defendant Mrs. Porter, and one Louis Lynch.

The first count of the complaint alleges that two trusts were established under B. A. Lynch's will and codicil, one known as the "Marital Deduction Trust" and the other known as the "Residuary Trust." The plaintiff alleges that he is a contingent beneficiary of the Marital Deduction Trust and a one-third income beneficiary of the Residuary Trust, with a remainder interest in the latter trust contingent upon his surviving until 1983 or until the death of the widow, defendant Dora A. Lynch, whichever event should last occur.

The complaint alleges that after the completion of the administration of the estate of B. A. Lynch in the year 1965, the assets thereof were transferred by the executors to the trustees for the two trusts. As a result of the transfer the Marital Deduction Trusts obtained 57.5244 per cent of the assets of the estate and the Residuary Trust the remaining 42.4756 per cent of the estate.

Paragraph 9 of the complaint states that defendant Martha Ann Lynch Porter became a successor co-trustee of the two trusts on May 17, 1968, and from that date forward acted as such co-trustee together with Mrs. Dora Lynch, the widow of the decedent. On that same day, May 17, 1968, it is alleged that one of the trustees, Martha Ann Lynch Porter, purchased on behalf of the trustees 2,200 shares of the capital stock of the Farmers & Merchants Bank and Trust Company of Blytheville from her husband, the defendant Robert A. Porter, and caused the trustees to pay $78.00 per share therefor, or a total of $171,600. It is alleged that this purchase was in violation of Mrs. Porter's fiduciary duty to the trusts and to the plaintiff as a bene-

ficiary thereof "to refrain from self-dealing." It is further alleged that the trusts borrowed certain funds from the Farmers & Merchants Bank and Trust Company to finance the stock purchase and that the trusts paid the sum of $9,599.63 as interest upon this loan from the date it was made until December 31, 1968, at which time it is alleged that the same stock was sold by Mrs. Porter, one of the trustees, for the sum of $132,000, resulting in a net loss (including the interest paid on the bank loan) of $49,199.63.

The complaint alleges that Robert A. Porter, the husband of trustee Mrs. Martha Ann Lynch Porter, participated in the latter's breach of trust and "counseled, aided and abetted her in said violation." The plaintiff alleges that he has demanded rescission of the transaction referred to above but that the defendants failed and refused to so rescind the transaction.

The prayer in count I asks for a derivative judgment on behalf of the trusts against the defendants Mr. and Mrs. Porter jointly and severally, for the sum of $49,199.63 with interest from May 17, 1968.

Count II purports to set up a separate cause of action to request the removal of the defendant Mrs. Porter as trustee by reason of her alleged violations of her fiduciary duty in making the transactions referred to above. The second count also seeks to recover the costs of the suit, including a reasonable attorney's fee. In addition to the three defendants referred to above, plaintiff's brother, Louis Lynch, is also named a party defendant with respect to the second count in the original complaint. It is alleged that Louis Lynch is a non-resident of Arkansas with Memphis, Tennessee, as his last known address. In the second count plaintiff relies upon an Order of the Chancery Court of Chickasawba District of Mississippi County, Arkansas, allegedly entered on May 17, 1968, and upon a certain "Stipulation" (copies of the Order and Stipulation being attached to the complaint) as the basis for a further prayer

that he be automatically named successor trustee in the event of Mrs. Porter's removal.

On May 25, 1970, the defendants first filed a motion to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, "for want of jurisdiction of the subject-matter of this suit, or, in the alternative to decline to exercise this jurisdiction, in deference to the previously attached jurisdiction of the Chancery Court of Mississippi County, Arkansas . . ."

The May 25, 1970, motion to dismiss has attached thereto two items: (1) a "Disclaimer" dated May 1, 1970, and signed by Mrs. Dora Lynch, Mrs. Martha Ann Lynch Porter, and Louis Lynch; and (2) a "Ratification and Confirmation" dated April 10, 1969, signed by the same three persons.

The "Disclaimer" states that those signing it disclaim any interest in this lawsuit. It goes on to state, "As far as we are concerned, this lawsuit is solely for the benefit of Bert Lynch, Jr." It further states that those signing it also executed the "Ratification and Confirmation" instrument on April 10, 1969, "in which we ratified the purchase by Robert A. Porter of the bank stock and the sale by Porter to the Lynch trusts on May 17, 1968," and "also ratified the subsequent sale of the stock by the trusts almost a year later to Robert A. Porter." The "Disclaimer" concludes: "Bert Lynch, Jr. is acting solely for himself in this litigation and not for us, the only beneficiaries of the Lynch trusts except for himself."

The instrument entitled "Ratification and Confirmation" states that the three persons signing it, "for and in consideration of the mutual benefits received and to be received by all interested persons in the testamentary trust of B. A. Lynch, deceased," agreed to ratify and confirm the matters leading up to the obtaining of the order of May 17, 1968, under which Bert Lynch, Jr., (the plaintiff herein), resigned as trustee and Martha Ann Lynch Porter (one of

the defendants herein) succeeded him. It also purports to ratify and confirm the acquisition by the defendant Robert A. Porter from the plaintiff B. A. Lynch, Jr., and his wife, of 2,200 shares of the bank's stock for $78.00 per share. The "Ratification and Confirmation" goes on to state that those signing it "understood that the actual fair market value of the stock was only $60.00 and that the $18.00 per share was being paid to B. A. Lynch, Jr., to settle a vexatious family lawsuit." The instrument further purports to ratify and confirm the immediate transfer of this stock to the Lynch trust for the same sum of money and the obtaining of loans from the bank and from Mrs. Dora Lynch to finance the purchase. Finally, the instrument purports to ratify the subsequent sale of the stock to Robert A. Porter for $60.00 a share, which is stated to be its actual fair market value. The last paragraph of the "Ratification and Confirmation" acknowledges that Bert Lynch, Jr., the plaintiff herein, was complaining about the transactions and that those signing the instrument were doing so "to express their confidence in the two trustees, Mrs. Lynch and Mrs. Porter, in the event that this transaction is ever questioned in any legal proceeding by Bert Lynch, Jr."

In their first motion to dismiss, the defendants contended that the complaint did not affirmatively show the requisite jurisdictional amount. Even though the issue is now moot, the Court states its opinion that there was no substance to that argument, even if it considered all of the matters submitted by the defendants, including the "Disclaimer" and the "Ratification and Confirmation," referred to above. It is not now necessary for the Court to set forth the analysis, reasoning, or legal authorities which formed the basis of this opinion. It is sufficient to state that the Court would have concluded on the basis of the pleadings and exhibits before it that the plaintiff had properly alleged diversity jurisdiction, seeking to recover derivatively on behalf of the trusts the full amount of any loss occasioned by the alleged self-dealing by one of the trustees together with

interest thereon. Therefore the original motion of the defendants to dismiss with respect to count I of the complaint would have been denied in the absence of the circumstances set forth in the new motion to dismiss filed October 2, 1970.

A more difficult problem is presented with respect to count II of the complaint. The jurisdiction of this Court over that cause of action can be predicated only upon the theory that it is "pendent" litigation. The Court does not agree with the plaintiff that, should he prevail upon count I, he would *automatically* be entitled to the relief sought in count II. The actions of a court in determining to replace a trustee and, if so determined, in selecting the successor trustee, are matters of judicial discretion which go beyond the merits of circumstances such as those set forth in count I or the agreements of certain interested persons. It is true that a finding of "self-dealing" would certainly be given great weight by most courts, but that finding might not be considered necessarily controlling in the light of all of the circumstances that might be present. Therefore, if this Court were to retain jurisdiction over count II, it would have to exercise the discretion which is traditionally vested in the chancery and probate courts of this state. Furthermore, if this Court should choose to replace one of the trustees, the matter would then revert to the jurisdiction of the probate court, which would have to continue the supervision of the adminisitration of the trusts. See *Urbano* v. *Bd. of Managers of the N. J. State Prison*, 415 F.2d 247, 258 n.27 (3d Cir. 1969) (dictum). It would not be wise to require that court to oversee such administration while depriving it of the power to keep, or replace, trustees. So, even if it were not necessary for the Court to dismiss count I, it would still be most reluctant to entertain count II and would not be inclined to do so unless clearly so required by law. The circumstances mentioned in the defendants' second motion to dismiss, filed October 2, 1970, make it unnecessary to decide the latter question.

The defendants' second motion to dismiss, filed October 2, 1970, renews their earlier contentions but, further, asks this Court to dismiss count I for mootness on the ground that the defendants have now paid to the trusts all sums demanded.

It appears from the record that the defendant Mrs. Dora Lynch paid to the trusts on or about October 1, 1970, the sum of $52,442.92, representing the entire amount sought to be recovered by the plaintiff under count I on behalf of the trusts, plus interest. In addition Mrs. Lynch has agreed to pay all costs adjudged in connection with count I. Although payment has been made, the defendants specifically point out that such action is not to be taken as a concession or admission that the plaintiff had a legal cause of action against any of them.

The Court finds that such payment has been made and concludes that count I has become moot and must be dismissed. See *California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308 (1893). The prohibition against deciding moot cases in federal courts has, indeed, a constitutional basis under article III. See *Flast* v. *Cohen*, 392 U.S. 83, 95 and n.12 (1968); *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l* v. *Missouri*, 361 U.S. 363, 367-8 and n.7 (1960); and *Konstantinidis* v. *S.S. Tarsus*, 248 F.Supp. 280 (S.D.N.Y. 1965), *aff'd per curiam*, 354 F.2d 240 (2d Cir. 1965).

This is not, in a technical sense, a jurisdictional issue. The Court has jurisdiction of count I but must dismiss because of mootness.

What is the effect of this determination on count II?

The Court concludes that, even with the dismissal of count I for mootness, it still would have jurisdiction over "pendent" litigation and, under some circumstances, might justly proceed to determine the issues in such litigation. But not so here.

Any decision made by this Court with respect to the issues raised in count II would constitute an interference

with the administration of the trusts involved, which should be conducted under the supervision of the Chancery Court, Chickasawba District, Mississippi County, Arkansas. See Scott, Trusts, § 566 at p. 3805 (3d ed. 1967). As stated above, even if count I remained, this Court would not have considered count II unless *required* to do so under such circumstances. The Court does not believe the law would have required such a result even in that case. It is confident that such a result is not required where the federal cause of action is dismissed before trial as here. See *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726-7 (1966).

So, while this Court may still have technical jurisdiction over count II after the dismissal of count I, it concludes that it has no choice but to dismiss that claim, without prejudice, in the exercise of sound discretion.

Count II can more appropriately be decided in our state's courts; see *Odom* v. *Travelers Ins. Co.,* 174 F. Supp. 426 (W.D. Ark. 1959); *Lightfoot* v. *Hartman,* 292 F. Supp. 356 (W.D. Mo. 1968); *Northrup* v. *Browne,* 204 F. 224, 230 (8th Cir. 1913); and, therefore, it should be dismissed. See *Wham-O-Mfg. Co.* v. *Paradise Mfg. Co.,* 327 F.2d 748, 753-4 (9th Cir. 1964).

This memorandum shall constitute the Court's findings of fact and conclusions of law and shall be the basis of its Order of Dismissal entered this date.

Dated this 27th day of January, 1971.

United States District Judge

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1069

BERT A. LYNCH, JR., *Appellant,*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, and MARTHA ANN LYNCH PORTER and DORA A. LYNCH, Trustees of the Marital Trust and Residuary Trust Established Under the Last Will and Testament and First Codicil Thereto of B. A. Lynch, Deceased, *Appellees.*

Appeal from the United States District Court for the Eastern District of Arkansas.

[August 3, 1971.]

Before LAY, HEANEY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiff-beneficiary Bert A. Lynch, Jr., a citizen of the State of Missouri, initially sought relief against trustees of two testamentary trusts by bringing this diversity suit in two counts: (1) for restoration of trust funds allegedly diverted by the trustee through self-dealing,[1] and (2) for

[1] Plaintiff is an income beneficiary and contingent remainderman of two testamentary trusts created by the will of his father. A substantial portion of the assets of these trusts consists of stock in the Farmers & Merchants Bank of Blytheville, Arkansas. In settlement of an earlier suit between these parties, plaintiff agreed to sell some of his personal holdings in this bank stock to his brother-in-law, Robert Porter, for $78 a share. It was alleged that on the same day when plaintiff acquired the stock, Robert without knowledge of the plaintiff, arranged through his wife, Martha, to sell the stock to the trusts for $78 a share. Some months later Robert reacquired these shares from the trusts for $60 a share thus causing an alleged loss to the trusts of $49,199.63. Throughout these transactions Martha acted in the capacity of trustee in dealing with Robert.

removal of one of the trustees, Martha Ann Lynch Porter. In his complaint plaintiff joined Martha Ann Lynch Porter, a beneficiary and cotrustee; Robert A. Porter, her husband; Dora A. Lynch, a beneficiary and cotrustee: all citizens of the State of Arkansas, and Louis Lynch, a beneficiary, allegedly a citizen of the State of Tennessee, as individuals.[2] He also joined Martha Ann Lynch Porter and Dora A. Lynch in their capacity as trustees of the marital and residuary trusts established in the will of plaintiff's father, B. A. Lynch, deceased. After the filing of this suit the cotrustee, Dora A. Lynch, mother of both the plaintiff and the alleged wrongdoer, Martha, restored to the trusts the amount prayed for under Count I. Defendants then moved to dismiss plaintiff's complaint "for want of jurisdiction of subject matter" and "mootness." The federal district court sustained defendants' motion and plaintiff has appealed.

The federal district court ruled the first count moot, and considered the second count "pendent" to the first. Defendants urged that the district court should refuse to exercise its pendent jurisdiction over this issue in deference to the state chancery court's jurisdiction in a subsequently filed accounting suit.[3] The trial court found if it removed a trustee "the matter would then revert to the jurisdiction of the probate court, which would have to continue the supervision of the administration of the trusts." The district court observed this would require "an interference with the administration of the trusts which should be conducted under the supervision of the

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[2] Disclaimers of interest in this action and a "ratification and confirmation" of the complaint transaction were filed by Louis, Martha and Dora as the only other beneficiaries of these trusts.

[3] After restoration to the res of the funds allegedly diverted from the trust defendants filed a suit for an accounting and court approval of the trustee's action in the Chancery Court of the Chickasawba District of Mississippi County, Arkansas.

Chancery Court." In support of dismissal the trial court relied on *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), where the Supreme Court said: "if the *federal* claims are denied before trial, even though insubstantial in a jurisdictional sense, the *state* claim should be denied as well." (Our emphasis.) Thus the trial court concluded it had "no choice" but to dismiss plaintiff's suit.

The sole issue on appeal is whether the trial court was correct in treating Count II, seeking removal of the trustee, as a pendent claim and refusing to retain jurisdiction of this matter as an exercise of sound discretion.

Pendent jurisdiction in a *diversity action* attaches to a claim when that claim, lacking in independent jurisdictional requirements, cannot be aggregated with the other claims in the suit. However, the trial court may find that the ancillary claim is so closely related to the subject matter being adjudicated that considerations of judicial economy and fairness to the litigants require assumption of jurisdiction. *Hatridge* v. *Aetna Casualty & Surety Co.,* 415 F.2d 809 (8 Cir. 1969). In such cases aggregation is usually not possible because there is a distinctness of claims and a difference of parties—i.e., one plaintiff suing in two capacities, or a single plaintiff asserting separate and distinct claims against two or more defendants, or two related plaintiffs seeking separate relief from integrated claims against the same defendant. Cf. *Borror* v. *Sharon Steel Company,* 327 F.2d 165 (3 Cir. 1964); *Wilson* v. *American Chain & Cable Company,* 364 F.2d 558 (3 Cir. 1966); *Jacobson* v. *Atlantic City Hospital,* 392 F.2d 149 (3 Cir. 1968).

Undeniably, the trial court had jurisdiction over Count I.[4] Federal jurisdiction was based on diversity of citizen-

[4] There exists no defect of parties. All beneficiaries are normally deemed indispensable parties to an equitable suit seeking restoration of the res. 3 Moore Fed. Prac., ¶ 19.18(1), at p. 2564

ship and the alleged amount in controversy exceeded $10,000. In this count plaintiff prayed for the relief of restoration of trust funds "derivatively on behalf of the trust." Thus, the apparent capacity in which plaintiff seeks this relief differs from that in Count II where plaintiff sues on his own behalf as beneficiary of the trust. Apparently, it is this assumed dual-capacity which induced both the trial court and the plaintiff to believe that these claims cannot be aggregated and, as a consequence, that Count II must be "pendent." The form of the pleading was misleading. Plaintiff's allegations that the claim for damages is "derivative" misconstrues the nature of the right he seeks to enforce.[5] And since this issue relates to the basic jurisdiction of the federal court, it is incumbent on this court to ascertain the correctness of the jurisdictional ruling. See *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934); *Roberson* v. *Harris*, 393 F.2d 123 (8 Cir.

(2d ed. 1970). However, where a disclaimer of interest is filed by a beneficiary, he becomes an unnecessary party. 3 Moore, supra, ¶ 19.03, p. 2157, citing *Grant County Deposit Bank* v. *McCampbell*, 194 F.2d 469 (6 Cir. 1952). Nevertheless, we deem Louis Lynch's joinder as a party defendant to the suit proper. His attitude toward the litigation as manifested by his disclaimer dictates his proper alignment as a party defendant. See *Green* v. *Green*, 218 F.2d 130 (7 Cir. 1955). Cf. *Brown* v. *Denver Ominbus & Cab Co.*, 254 Fed. 560 (8 Cir. 1918).

Count I was originally attacked as being deficient in jurisdictional amount on the theory that plaintiff's distributive share of the trust res involved was less than $10,000. Cf. *Sawyer* v. *Davis*, 408 F.2d 358 (8 Cir. 1969). The trial court properly ruled that jurisdictional amount had been established. Although plaintiff sues individually he nevertheless seeks to enforce a right commonly held by all beneficiaries to obtain restoration to the trust of the full loss.

Under Count II all beneficiaries need not be joined in a suit to remove a trustee. See *Wesson* v. *Crane*, 165 F.2d 6, (8 Cir. 1948).

[5] Substance of the pleadings should control. See *Richardson* v. *Communications Workers of America*, AFL-CIO, No. 20,236 (8 Cir. June 4, 1971).

1968); *Texaco-Cities Service Pipe Line Co.* v. *Aetna Casualty & Surety Co.*, 283 F.2d 144 (8 Cir. 1960); *Schroeder* v. *Freeland*, 188 F.2d 517 (8 Cir. 1951).

It is a recognized principle of law that a suit for restoration of the trust res from a trustee seeks enforcement of a right belonging only to the beneficiary. Restatement Trusts 2d § 200. When such a breach of trust occurs it must be redressed by the beneficiary who may sue the trustee for restoration and also seek the latter's removal. See, Restatement, Trusts 2d §§ 199 and 201. By contrast, a derivative suit involves the enforcement of a right of action which belongs to another. Wright, Fed. Courts § 73 (1970); Moore, supra ¶ 23.1.16(1). Thus if the trust res were harmed by a third party, and the trustee refused to act, a derivative action would lie against the wrongdoer by the beneficiary on behalf of the trust. See Scott, Trusts, § 282.1 (3d ed. 1967).

Here, the injury to the res was caused by the trustee, thus the claim for breach of trust belongs solely to the beneficiary and not to the trust.[6] The action is therefore not derivative. Consequently, the claim for relief in Count I is of the same equitable nature as the beneficiary's suit to remove the trustee. Thus we conclude that plaintiff was not suing in different capacities and that Count II was not pendent.

It is a well settled rule that once diversity jurisdiction is properly invoked, a single plaintiff may properly aggregate all of the claims which he has against the defendants

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[6] While it is true that Robert A. Porter is a third party and not a trustee or beneficiary, he is alleged to have "counseled, aided and abetted" Martha in the violation of her fiduciary duty. In such an instance, the primary right of action against the third party belongs to the beneficiary even though the trustee may also sue. Scott, Trusts, § 282.1, p. 2338 (3d ed. 1967).

to satisfy the jurisdictional amount.[7] *Edwards* v. *Bates County*, 163 U.S. 269 (1896); *Simecek* v. *United States National Bank of Omaha*, 91 F.2d 214 (8 Cir. 1937); *Alberty* v. *Western Surety Co.*, 249 F.2d 537 (10 Cir. 1957); *Potter's Photographic Applications Co.* v. *Ealing Corp.*, 292 F.Supp. 92 (E.D.N.Y. 1968). And, of course, subsequent events reducing the amount in controversy will not affect the jurisdiction of the court. *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938); *State Farm Mutual Automobile Ins. Co.* v. *American Casualty Co.*, 433 F.2d 1007 (8 Cir. 1970); *United States Fidelity & Guaranty Co.* v. *Millers Mutual Fire Ins. Co. of Texas*, 396 F.2d 569 (8 Cir. 1968); *Home Ins. Co. of N.Y.* v. *Trotter*, 130 F.2d 800 (8 Cir. 1942).

Once claims have been properly aggregated and original jurisdiction has attached, dismissal of one claim does not leave those remaining, although for less than the jurisdictional amount, under the pendent jurisdiction of the court. The remaining claim stays within the court's original diversity jurisdiction. See e.g., *State Farm Mutual Auto Ins. Co.* v. *American Casualty Co.*, 433 F.2d 1007 (8 Cir. 1970); *Stewart* v. *Shanahan*, 277 F.2d 233 (8 Cir. 1960); *Birkins* v. *Seaboard Service*, 96 F.Supp. 245 (D.N.J. 1950).

Assuming federal jurisdiction arguendo, defendants additionally urge that the district court should nevertheless abstain from passing on the claim relating to removal of

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[7] See especially *Stone* v. *Stone*, 405 F.2d 94 (4 Cir. 1968) where a settlor sued a trust beneficiary and the mother of the beneficiary for misappropriation of trust corpus. In the first count the settlor sought $8,321.05 from the mother for unlawful diversion of the corpus (shares of stock), and in the second count the settlor charged the beneficiary with wrongful refusal to endorse the stock certificates which had a value of $5,583.00. The beneficiary's mother was named as a co-defendant in the second count based on an allegation of aiding and abetting the beneficiary's tortious conduct. Jurisdictional amount was satisfied by aggregating the two claims against the mother.

the trustee. The defendants' reasoning, as adopted by the district court, is that the question of removal involves application of state law and abstention will avoid any undue interference with the state court's jurisdiction over the res of the trust. This reasoning misconstrues the doctrine of abstention. Simply because the question before the court involves state law does not require abstention of a federal court. As stated by the Supreme Court in *Meredith* v. *Winter Haven,* 320 U.S. 228, 236 (1943): "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine." See also, *Baggett* v. *Bullitt,* 377 U.S. 360, 375 (1964); *McNeese* v. *Board of Education,* 373 U.S. 668, 673, n. 5 (1963); *Allegheny County* v. *Mashuda Co.,* 360 U.S. 185, 196 (1959); *Propper* v. *Clark,* 337 U.S. 472, 490 (1949). Here there exists no problem of construction or interpretation of a state statute or constitutional principle. There is no alleged uncertainty or ambiguity of state law, nor does any appear to exist. The state court had no custody of the res at the time suit was filed. Once the executors closed the testator's estate and delivered the res to the trustees, the probate court's jurisdiction terminated. There exists no continuing administration of the trust in the courts of Arkansas.[8] The

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[8] See *Thompson* v. *Dunlap,* 424 S.W.2d 360, 224 Ark. 178 (1968), which states: "Judicial supervision of a trust unavoidably involves added expense in court costs and attorney's fees. In the absence of a direction by the creator of the trust that it be so supervised and of any peculiar facts suggesting the desirability of such judicial scrutiny, we are of the opinion that the issue (of continuing administration) should not be raised by the court on its own motion."

In the instant case the testator provided in the trust instrument, "they (the trustees) shall not be required to file reports with any court." See *Hastings* v. *Jackson,* 148 S.W.2d 305 (Ark. 1941), for the effect of such a clause on the duty to account.

argument that any federal action will interfere with the state court's administration of the trust is illusory. The state suit was filed subsequent to the institution of this action. Our analysis does not disagree with the district court's apt appraisal and preference to have the state Chancery Court administer the accounting. However, state courts have only concurrent jurisdiction in matters such as these, and preference of the district court alone, cannot defeat federal jurisdiction once properly invoked. As stated in *Meredith*, supra, "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. . . . [I]t has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked to decide questions of state law whenever necessary to the rendition of a judgment." 320 U.S. at 234. See also *Martz* v. *Braun*, 266 F.Supp. 134 (E.D. Pa. 1967), holding in a case similar to the one at bar that it would be an abuse of discretion to abstain on the basis of federal-state comity.

We find that the district court erred in declining to retain jurisdiction of plaintiff's remaining claim for relief seeking removal of the trustee. The court may entertain a motion, *if deemed necessary*, to protect its jurisdiction since federal jurisdiction over the subject matter was initially and properly invoked. *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939).

Judgment reversed and the cause remanded for further proceedings in accord with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1970

No. 71-1069

BERT A. LYNCH, JR., *Appellant,*

v.

MARTHA ANN LYNCH PORTER, ROBERT A. PORTER, LOUIS LYNCH, DORA A. LYNCH, MARTHA ANN LYNCH PORTER AND DORA LYNCH, Trustees of the Marital Trust and Residuary Trust established under the Last Will and Testament and First Codicil thereto of B. A. Lynch, deceased, *Appellees.*

This Cause came on to be heard on the original files of the United States District Court for the Eastern District of Arkansas and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, reversed.

And it is further ordered that this cause be remanded for further proceedings in accord with this opinion of this Court this day filed herein.

August 3, 1971